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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 397

NELLIE DALE CLEMENS,

Petitioner,

vs.

WILLIAM L. CLEMENS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AND BRIEF IN SUPPORT THEREOF.

VIVIAN O. HILL,
Counsel for Petitioner.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, DISTRICT OF COLUMBIA.

Nellie Dale Clemens, by her attorney, prays for the issuance of a writ of certiorari to review a judgment of the United States Court of Appeals for the District of Columbia, entered June 12, 1944, in this cause.

Opinion Below.

The opinion of the United States Court of Appeals for the District of Columbia is at this time only reported in 72 Washington Law Reporter, 476 (R. 19). A timely application for rehearing was denied by that Court June 30, 1944 (R. 21).

Jurisdiction.

This Court has jurisdiction under section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and of June 7, 1934, and by virtue of the claimed violation of the provisions of the Constitution of the United States.

Statement of the Case.

This case involves judicial decisions affecting the marital status of the parties hereto rendered in the State of New York, and in the District of Columbia. New York State first acquired jurisdiction over the parties and the subject-matter, when the Supreme Court of that State received the Complaint of petitioner on September 22, 1938, against respondent herein, in which he was personally served in that State, and answered. That court, after a trial of the case, made Findings of Fact, Conclusions of Law, and entered judgment on April 13, 1940, in favor of petitioner, granting her a legal separation from her husband upon the grounds of *cruelty*, *desertion*, and *non-support* (R. 12-15).

In a subsequent proceeding, on July 25, 1941, with personal service upon the husband again, that court held him in contempt for failure to comply with its order for alimony, and enjoined him from commencing any action or actions affecting the matrimonial status of the parties outside the jurisdiction of the State (R. 16, 17). No appeal was ever taken from either judgment and they have long since become res judicata.

The husband left the State of New York and came to the District of Columbia, where, on March 10, 1937, he filed a suit in the United States District Court (Equity No. 63-886) for absolute divorce upon the ground of desertion, which was dismissed October 20, 1939, because of failure to

prove the charge. He filed a second suit in that court for absolute divorce upon ground of voluntary separation on November 1, 1939 (Civil Action No. 4617), which was dismissed May 7, 1941, for lack of residence. He filed a third suit in that court on May 7, 1941, Civil Action No. 11-290, for absolute divorce upon ground of five years voluntary separation, in which he was granted an absolute divorce by judgment of March 28, 1943. An appeal was taken, and the United States Court of Appeals for the District of Columbia, on June 12, 1944, in a per curiam opinion, affirmed. A petition for rehearing in that court was denied June 30, 1944.

Questions Presented.

1. Did the courts of the District of Columbia give full faith and credit to the judgments and proceedings of the Supreme Court of the State of New York in granting the husband an absolute divorce in this case upon the ground of five years *voluntary* separation after the New York court had entered a valid judgment granting petitioner herein a legal separation upon the grounds of cruelty, desertion, and non-support, and had also enjoined him from commencing any action or actions outside the State of New York affecting the marital status of the parties?

2. Where a wife has been granted a legal separation upon the grounds of cruelty, desertion, and non-support, can a husband under the provisions of Title 16, Section 403, District of Columbia Code (1940), thereafter successfully maintain a suit against his innocent wife upon the ground of voluntary separation merely because she does not offer or seek to effect a reconciliation during the period of their separation?

Statutes Involved.

Act of May 26, 1790, c. 11, 28 U. S. C. A. § 687, enacted in conformity with provisions of Article IV, § 1, U. S. Constitution, which directs that,

> "Full faith and credit shall be given in each state to the Public Acts, Records and Judicial Proceedings of every state," providing that judgments, "shall have such faith and credit given them in every court within the United States as they have by law or usage in the courts of the state from which they are taken."

Title 16, Section 403, District of Columbia Code (1940):

> "A divorce from the bond of marriage or a legal separation from bed and board may be granted for adultery, desertion for two years, voluntary separation from bed and board for five consecutive years without cohabitation, final conviction of a felony involving moral turpitude and sentence for not less than two years to a penal institution which is served in whole or in part. A legal separation from bed and board may be granted for cruelty. Provided, that where a final decree of divorce from bed and board heretofore has been granted or hereafter may be granted and the separation of the parties has continued for two years since the date of the decree, the same may be enlarged into a decree of absolute divorce from the bond of marriage upon the application of the innocent spouse.

Reasons Relied Upon for Allowance of the Writ.

1. The decision is contrary to the provisions of Article IV, § 1, United States Constitution, and the statute passed in conformity therewith, in that it fails to give full faith and credit to the judgments and proceedings of the Supreme Court of the State of New York between the parties hereto, and to decisions of this Court holding that full faith and

credit, not just some faith and credit, must be extended to the judgments and proceedings of other States in such cases.

2. The construction placed upon Title 16, Section 403, of the District of Columbia Code in this case is erroneous. It does not seem reasonable that Congress intended by its terms to grant a husband an absolute divorce upon the ground of five years *voluntary* separation where he had been guilty of cruel and inhuman treatment of his wife, rendering it unsafe and improper for her to cohabit with him, which fact had been judicially determined by a court of competent jurisdiction, and the question was res judicata between the parties.

WHEREFORE it is respectfully submitted this petition for allowance of writ of certiorari should be granted.

VIVIAN O. HILL,
Southern Building,
Attorney for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 397

NELLIE DALE CLEMENS,

Petitioner,

vs.

WILLIAM L. CLEMENS.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The opinion of the United States Court of Appeals appears in the transcript of record at page 19, and is only reported at this time in 72 Washington Law Reporter, 476.

The questions presented, Statutes involved, Statements of Jurisdiction and of the Case, as well as reasons relied upon, appear in the foregoing Petition, and in interest of brevity are not repeated here.

Specification of Error.

It was error to refuse full faith and credit to the judgments and proceedings of the Supreme Court of the State of New York, which acquired first jurisdiction over these parties and the subject-matter, and held the husband guilty of cruel and inhuman conduct, desertion, and non-support, and enjoined him from commencing any action

or actions outside that State affecting the marital status of the parties.

There was no voluntary separation of the parties hereto within the meaning of Section 403, Title 16, District of Columbia Code, where it clearly appears the New York State Court had found the husband had been so cruel it was unsafe and improper for petitioner to cohabit with him, and it was error to hold their separation was voluntary in such circumstances.

It was error to grant the husband an absolute divorce upon the ground of five years voluntary separation when he was guilty of such conduct that made it unsafe and improper for petitioner to cohabit with him and which had been judicially determined by a court of competent jurisdiction.

It was error to hold in effect that a husband may by his own misconduct render life with him by his wife intolerable, and dangerous to her very life, and at the expiration of five years grant him an absolute divorce upon the ground of voluntary separation if the wife has not in the meantime offered to return to live with him and thereby possibly place her life in jeopardy.

Argument.

1. That the Courts of the District of Columbia should give full faith and credit to the judgments and proceedings of the Supreme Court of New York is beyond question. They are entitled to full faith and credit, not just some faith and credit, and this Court has uniformly so held.

Williams v. *State of North Carolina*, 317 U. S. 287, 63 S. Ct. 207;

Davis v. *Davis*, 305 U. S. 32, 59 S. Ct. 3;

Barber v. *Barber*, 62 U. S. 582, 21 How. 582, 16 L. Ed. 226.

The holding that the parties to this litigation had lived apart voluntarily for five years prior to the date suit was filed (May 7, 1941) is contrary to the judgments and proceedings of the New York Court between the same parties, as shown by its Findings of Fact, Conclusions of Law, and Judgments of April 13, 1940, and July 25, 1941. Indeed, as late as March 10, 1937, the husband did not think there was a voluntary separation, for on that date he filed a suit in the District Court here, Equity No. 63,886, against petitioner for absolute divorce upon the ground of *desertion*, his complaint being under oath.

It will be remembered also that the New York Court first acquired jurisdiction over these parties and the subject-matter and restrained the husband from commencing any action or actions affecting the marital status of the parties outside the jurisdiction of that State.

2. Title 16, Section 403, District of Columbia Code does not authorize the granting of an absolute divorce to either party where a judgment for limited divorce has been entered and two years have thereafter elapsed, it specifically limits such action to the *innocent* party, certainly not the husband in this case.

There was some testimony by the husband in the District Court here about a separation agreement which had no place in the case, and the decisions here are in nowise based upon that angle. However, there was an agreement between the parties in the nature of a financial settlement, but which was terminated in accordance with its terms, as set out by the husband under oath in his Answer filed in the District Court here (Original Record 33). The New York judgment and proceedings subsequently rendered made no mention of it which confirms the husband's state-

ment it had been terminated, and consequently was of no evidentiary value in the case on trial here.

The District of Columbia courts in this case appear to have relied almost entirely upon the ruling and reasoning set out in the case of *Parks* v. *Parks*, 72 App. D. C. 93, 116 F. (2d) 356, where the pertinent facts appear to us to be almost wholly dissimilar from those involved in the case at bar. There the husband deserted his wife. They entered into a separation agreement; the wife secured a limited divorce on the ground of desertion. Later the husband applied for a divorce upon the ground of voluntary separation for five years which was granted. The Court of Appeals affirmed upon the somewhat doubtful ground, among others, that because the deserted spouse had not endeavored to effect a reconciliation she finally consented to the separation and made it voluntary. Whatever the equity might be in that case, where there was at least an outstanding separation agreement between the parties, it does not seem to be in point here. It is one thing for a husband to desert his wife without presenting any violence or danger to her life or limb, and that continues for five years without any effort on her part to effect a reconciliation, but it is quite a different situation where he beats his wife so inhumanly as to render it unsafe and improper for her to cohabit with him. In that circumstance could it in reason be said the wife must agree to go back with him, if he would take her back, and go through the same abuse again, or face the alternative that he could have a Federal court grant him an absolute divorce upon the ground of *voluntary* separation, and afford him an opportunity to marry again and possibly repeat the performance?

The adjective *voluntary* in its accepted everyday use according to Webster's Unabridged Dictionary (1937) means,

> 1. Unrestrained by any external influence, force or interference; not compelled, prompted, or suggested by another; acting of one's or its own free will, choice, or accord; spontaneous.

The construction placed upon the voluntary separation language of the District of Columbia Code in this case is difficult to reconcile with the above definition, and it is earnestly submitted should not be allowed to stand.

That it is against sound public policy to grant a husband license to beat his wife until she is compelled to flee for her very life, and then within the comparatively short space of five years grant him a divorce upon the ground of voluntary separation, we submit, cannot be successfully denied, and Congress never intended any such result.

Conclusion.

It is earnestly submitted the petition for allowance of writ of certiorari in this case should be granted.

VIVIAN O. HILL,
Southern Building,
Attorney for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 397.

NELLIE DALE CLEMENS, *Petitioner,*

v.

WILLIAM L. CLEMENS, *Respondent.*

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

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OCTOBER TERM, 1944.

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v.

WILLIAM L. CLEMENS, *Respondent*.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

William L. Clemens, the above named respondent, submits the following brief in opposition to the petition for certiorari herein:

STATEMENT OF THE CASE.

This case is here on petition for certiorari filed by Nellie Dale Clemens, defendant in the District Court of the United States for the District of Columbia and appellant in the United States Court of Appeals for the District of Columbia.

Petitioner and respondent were united in marriage December 18, 1900, at St. Louis, Missouri, and thereafter lived together as husband and wife in Missouri and New York, except for three short periods of separation, until October 28, 1934, when they finally separated. They have not since lived or cohabited together (Orig. R. pp. 1, 8, 28), but have been and now are living voluntarily separate and apart from each other (Orig. R. p. 28).

Prior to separation, respondent was an employee of the National Surety Company in New York City. He obtained employment with the United States Housing Administration at Washington, D. C., and advised petitioner that it would be necessary for him to remain in Washington, but she informed him she would not come to Washington with him. He came to Washington on July 30, 1934, and has lived in the District of Columbia ever since, which place is his home (Orig. R. p. 28).

A short time after respondent came to Washington, petitioner motored down from New York, stopped at a hotel, saw and talked with petitioner, but refused to stay with him, and returned to New York, where she has lived ever since (Orig. R. p. 29).

About the month of February, 1936, petitioner brought a suit for legal separation and alimony against respondent in the Supreme Court of New York for the County of New York, during the pendency of which an agreement of separation, dated May 16, 1936, was entered into between the parties hereto (Orig. R. p. 29), a copy of which was annexed by petitioner to her answer filed in the first of the three divorce suits mentioned in the petition for certiorari herein at pages 2 and 3, namely, Equity cause No. 63,886 in the District Court of the United States for the District of Columbia. That agreement contained the following recitals:

> "WHEREAS plaintiff (petitioner here) and defendant (respondent here) heretofore and on or about October 28th, 1934, have separated and have ever since

lived and are now living separate and apart from each other.

* * * * * * * * *

"NOW THEREFORE it is hereby stipulated and agreed by and between plaintiff, defendant and the attorneys for the respective parties hereto, that:

* * * * * * * * *

" 'The parties hereto shall and may live separately and apart without the control of the other, and wheresoever they please' ".

In her answer, filed in said equity cause on or about October 12, 1937 (signed and sworn to by her September 28, 1937), petitioner alleged in paragraph 6 that

"* * * the separation agreement entered into between the parties is in full force and effect."

Because of that agreement, Equity cause No. 63,886 was dismissed on final hearing, respondent having been adjudged unable to prove desertion, the separation being voluntary.

In the second action mentioned on page 3 of the petition herein, namely, Civil Action No. 4617, which sought an absolute divorce on the ground of five years voluntary separation, petitioner filed an answer (signed by her personally but not sworn to) on or about March 5, 1940, in paragraph 4 of which she alleged:

"* * * the parties entered into an agreement of separation on the sixteenth day of May, 1936, in the City of New York; that that agreement is still in force and effect. * * *"

It is clear from these allegations that the agreement of May 16, 1936, continued in force and effect for approximately four years.

Civil Action No. 4617 in the District Court of the United States for the District of Columbia, filed November 1, 1940, was dismissed on final hearing by a judgment dated May 7, 1941, which recited:

> "That on March 6, 1940, a judgment was entered in the Supreme Court of the State of New York * * * in which it was found by the Court that in September, 1938, both parties were residents of the State of New York * * * that therefore in view of the husband's residence in New York in September, 1938, he cannot maintain this action * * *"

In the present case, Civil Action No. 11,290 in the District Court of the United States for the District of Columbia, the complaint was filed on May 7, 1941. Final hearing was had on March 16, 1943, and final judgment for absolute divorce on the ground of more than five years voluntary separation without cohabitation was entered March 22, 1943 (R. 7). An appeal therefrom was taken by petitioner to the United States Court of Appeals for the District of Columbia, and that court affirmed the judgment in a per curiam opinion on June 12, 1944 (R. 19).

SUMMARY OF ARGUMENT.

The Courts of the District of Columbia have given full faith and credit to the judgment and proceedings involved herein of the Supreme Court of New York for the County of New York.

A decree for limited divorce is not a bar to a subsequent action on different grounds for an absolute divorce.

The restraining order mentioned by petitioner merely enjoined the commencement of another action. It was issued after this proceeding was commenced. Respondent has not violated its provisions, as he has not commenced any action since it was entered.

The restraining order was void, as being in violation of the settled law in the State of New York, and was not entitled to be given full faith and credit.

Pendency of an action in one state is not a bar to the institution of another action in a different jurisdiction on the same subject-matter.

Public policy of states does not permit the enjoining of parties from proceeding in legal actions in another state on the same cause of action.

The purpose of the District of Columbia Statute is to permit termination of certain marriages in law that have ceased to exist in fact.

ARGUMENT.

As a specification of error, petitioner, on Page 1 of her Brief, argues that it was error for the courts of the District of Columbia to refuse full faith and credit to the judgments and proceedings of the Supreme Court of the State of New York.

Full Faith and Credit Was Given to Foreign Judgment.

It is clear from an examination of the proceedings in the District Court of the United States for the District of Columbia that full faith and credit was given to the judgment of the New York court (R. 14, 15). In that judgment, the New York court adjudged and decreed that respondent here pay to petitioner the sum of $15.00 per week as and for her support and maintenance. In the judgment of March 22, 1943, the trial court in this case found as a fact that the parties were then and had been for more than five years living separate and apart from each other voluntarily, and adjudged that respondent pay to petitioner "to apply on a judgment of the Supreme Court of the State of New York for the County of New York * * * awarding and granting to the defendant herein (petitioner here) a decree of separation from bed and board, the sum of Sixty Dollars ($60.00) per month * * *" (R. 7, 8). That was the only part of the New York judgment requiring, in order that it might be given full faith and credit, recognition in the judgment entered in this cause.

Limited Divorce No Bar to Absolute Divorce.

A decree for a limited divorce does not bar a subsequent action on different grounds for an absolute divorce.

Foxwell v. *Foxwell*, 118 Md. 471, 475, 84 A. 552 (1912), citing *Stewart* v. *Stewart*, 105 Md. 297.
Edgerly v. *Edgerly*, 112 Mass. 53, 55 (1873).
Evans v. *Evans*, 43 Minn. 31, 32, 44 N. W. 524, 7 L. R. A. 448 (1890).
Bakula v. *Bakula*, 186 Minn. 488, 489, 243 N. W. 703 (1932).
Williams v. *Williams*, 156 Md. 10, 13, 142 A. 510 (1928).
Driver v. *Driver*, 24 Pa. Dist. 250.
Parks v. *Parks*, 73 App. D. C. 93, 116 F. 2d 556.

The foregoing authorities clearly demonstrate that, giving to the New York judgment full faith and credit, it is not a bar to a proceeding in another jurisdiction or even in New York for an absolute divorce on an entirely different ground from that on which the judgment of legal separation was based.

On page 9 of her brief, petitioner states

> "It will be remembered also that the New York Court first acquired jurisdiction over these parties and the subject-matter and restrained the husband from commencing any action or actions affecting the marital status of the parties outside the jurisdiction of that State."

Restraining Order Not Effective.

The restraining order or injunction referred to was entered by the New York Court on *August 7, 1941*. It restrained respondent from *commencing* any action or actions outside New York. This litigation was commenced *May 7, 1941* (petition p. 3), three months before the restraining order was issued. Respondent has not *commenced* any action or actions affecting the marital status of the parties outside New York since the restraining order was

issued. If that restraining order was valid, it is clear that its provisions have not been violated by respondent. But it is the contention of respondent that the restraining order was invalid and unenforceable and was improperly entered.

Action in One Jurisdiction No Bar to Suit in Another.

The pendency of an action in the courts of one state or country is not a bar to the institution of another action between the same parties and for the same cause of action in a court of another state or country, nor is it the duty of the court in which the latter action is brought to stay the same pending a determination of the earlier action, even though the court in which the earlier action is brought has jurisdiction sufficient to dispose of the entire controversy.

Ryan v. *Seaboard, etc. R. Co.*, 89 Fed. 397.
White v. *Whitman*, 29 F. Cas. No. 17,561.
Title Ins. etc. Co. v. *California Dev. Co.*, 171 Cal. 173, 152 P. 542.
Gerke v. *Colonial Trust Co.*, 117 Md. 579, 83 A. 1092.
Sulz v. *Mutual Reserve Fund Life Assoc.*, 145 N. Y. 563, 40 N. E. 242.

Public Policy Forbids Injunction.

Upon principles of courtesy and public policy the power of a court of one state to enjoin the parties within its jurisdiction from proceeding in an action in another state will not be exercised ordinarily when the court of the other state has concurrent jurisdiction, unless there are peculiar equitable grounds.

French v. *Hay*, 22 Wall. 250, 22 L. ed. 857.
Pickett v. *Ferguson*, 45 Ark. 177.
Cunningham v. *Butler*, 142 Mass. 47, 6 N. E. 782.
Herfurth v. *Herfurth*, 77 App. D. C., 341, 135 F. 2d 948 (citing *Hyattsville Building Assoc.* v. *Bonic*, 44 App. D. C. 408 (1916), *Harlan* v. *Harlan*, 52 App. D. C., 98, 281 Fed. 602 (1922), and *Toucey* v. *New York Life Ins. Co.*, 314 U. S. 118 (1941).

In the case of *Kittle* v. *Kittle* (New York), 8 Daly's Rep. 72, the court said:

> "Our courts, from motives of comity and public policy, will not restrain parties, by injunction, from proceeding in actions commenced by them in other states, except in very special cases, to prevent injustice and oppression. This is the rule which has been recognized by adjudged cases in this State. (*Vail* v. *Knapp*, 49 Barb. 299; and the authorities there cited.)"

Neither the case in New York between these parties nor this proceeding is a "very special" case, nor does it appear that an injunction was necessary to "prevent injustice and oppression." Accordingly, it seems clear that the restraining order issued by the New York court on August 7, 1941, was contrary to the law of that State and, therefore, is invalid and unenforceable.

PURPOSE OF STATUTE INVOLVED.

In her petition and brief, petitioner contends that the construction placed on Title 16, Section 403, of the District of Columbia Code is erroneous, and that it does not seem reasonable that Congress intended to grant a husband an absolute divorce upon the ground of five years voluntary separation where he had been guilty of cruel and inhuman treatment of his wife, rendering it unsafe and improper for her to cohabit with him. (Petition, p. 5, Brief, p. 11.)

In the case of *Parks* v. *Parks*, *supra*, and again in the case of *Vanderhuff* v. *Vanderhuff*, No. 8590, decided June 26, 1944, and not yet reported, the United States Court of Appeals for the District of Columbia, in construing the statute here involved, has held that its purpose is "to permit termination in law of certain marriages which have ceased to exist in fact." The parties involved here have been separated since October 28, 1934, almost ten years. They entered into a voluntary agreement on May 16, 1936, over eight years ago. The petitioner brought an action for legal separation in February, 1936. Since the separation

she has not once expressed a desire to resume living with respondent. What the court said in the case of *Parks* v. *Parks, supra,* is peculiarly appropriate when applied to petitioner. In that case the following language appears:

> "Six consecutive years of separation had elapsed. The separation was not at first voluntary on the defendant's part; when the plaintiff deserted her, she begged him not to go. But from that time on she neither asked him to return nor made any other attempt to bring about a reconciliation. It is perhaps a fair inference that she reconciled herself to separation. But that, we think is not the question. Even if she did, in fact, wish her husband to return, in the course of time her silent acquiescence in the separation made it voluntary in the statutory sense. Desires which are not reflected in conduct have little or no social or legal significance. The law is full of instances in which the will that counts is the apparent rather than the secret will. The liberal purpose of the 1935 amendment points to this construction. *That purpose was to permit termination in law of certain marriages which have ceased to exist in fact.* This is such a marriage. We think the defendant's silent acquiescence made the separation **voluntary, in the statutory sense, within** less than a year after it began, and therefore more than five years before the plaintiff filed this suit. It follows that he is entitled to a divorce.
>
> "The fact that the separation resulted from the husband's fault is no defense, since the statute does not require that the separation originate in any particular way. It requires only that for five consecutive years the separation be voluntary. The separation agreement is no defense. * * *" (Italics added.)

In *Vanderhuff* v. *Vanderhuff, supra,* the same Court said:

> "We have already held that recrimination is not a defense in the case of voluntary separation from bed and board for five years."

Again in *Bowers* v. *Bowers,* decided June 26, 1944, 72 W. L. R. 843, the United States Court of Appeals for the

District of Columbia, in construing the same statute, used the following language:

> "The District of Columbia Code (1940), Sec. 16-403, authorizes divorce for 'voluntary separation from bed and board for five consecutive years without cohabitation.' The issue turns upon the continuing character of the separation, not its origin; but its origin is evidence of its continuing character. We have held that if both parties voluntarily and continuously acquiesce in separation during five years, the statute authorizes divorce *even though the separation was not originally voluntary on both sides.* Parks v. Parks, 73 App. D. C. 93, 116 F. 2d 556. It is equally true that if either party does not voluntarily and continuously acquiesce in separation during five years, the statute does not authorize divorce even though the separation was originally voluntary on both sides. *But one who contends that a voluntary separation ceased to be voluntary should have the burden of proving his contention.* The separation in the present case was originally voluntary on both sides. Although the wife afterwards asked her husband to return to her, the court was 'not convinced' that her requests were 'made in good faith.' It follows that the judgment should be affirmed." (Italics added.)

This case is like the *Parks* case in many respects. Even though the separation originally was not voluntary, so far as petitioner was concerned, she became reconciled to it as early as February, 1936, when she filed an action for legal separation in New York. She again evidenced her reconciliation thereto when she entered into the separation agreement of May 16, 1936. She has never, since filing her first action against respondent or, for the matter since the day of final separation, made the slightest attempt to effect a reconciliation with him. She has submitted no proof whatever that the separation ceased to be voluntary on her part after filing her original action for legal separation in New York. She has not sustained the "burden of proving" her contention, but asked the courts below and now asks

this Court to hold that the separation from her husband during the ten years of its duration has been involuntary on her part, when she has not evinced the slightest interest in a reconciliation with her husband and has made no attempt whatever to bring about a resumption of marital relations. The same situation would prevail if the separation continued for fifty years. It would be preposterous to bind respondent by the ties of matrimony to a wife who has no love or affection for him for a period of that length. It is equally as unreasonable to bind him for ten years, particularly when the applicable statute specifies that such marriages may be dissolved after the lapse of five years.

CONCLUSION.

Although probably unnecessary, respondent feels that one statement made in petitioner's brief should not go unchallenged. On page 10 of her brief, petitioner, through counsel, states:

> "It is one thing for a husband to desert his wife without presenting any violence or danger to her life or limb, and that continues for five years without any effort on her part to effect a reconciliation, but it is quite a different situation where he beats his wife so inhumanly as to render it unsafe and improper for her to cohabit with him."

There is no evidence in the record in this case showing that respondent ever so much as laid his hand upon petitioner, much less beat her. It would be as truthful to charge that he stabbed her with a knife or shot her with a pistol. The recital in the decree of the New York court is a formal one, included, it is understood, in every judgment of legal separation based upon cruelty, whether mental or physical. (See *Barber* v. *Barber*, 62 U. S. 582, 21 How. 582, 16 L. Ed. 226, 227; Sec. 1161, New York Civil Practice Act, Code Sec. 1762.)

Respondent respectfully contends that there is no merit in the petition for certiorari filed herein, and that it should, therefore, be denied.

Respectfully submitted,

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Washington, D. C.,
Attorney for Respondent.